No. 3385.

In the United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ALBERS,
Plaintiff-in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon

FILED

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With the leave of the Court the plaintiff in error respectfully submits the following to supplement his brief already filed:

Upon the hearing of this case before this Honorable Court (owing to our misunderstanding as to the length of time available for our closing argument), we left unsaid what we deem essential to a correct understanding of our view of the instructions of the District Court and the relation of those instructions to the points discussed in our brief. In our rebuttal argument we had proceeded far enough to say that the instructions were both elaborate and comprehensive. What we intended to explain further on was that however accurate in theory they may be they are misleading and erroneous as applied to the

case in hand. This explanation or qualification we deem most important lest it be inferred from what we said that the criticisms made in our brief upon those instructions were waived.

1. Our claim is that the intent with which the words laid in the indictment were uttered may be examined upon this appeal, and this is not reviewing a question of fact that was within the province of the jury. It has been decided that this may be done by the Court of Appeals even when error is not assigned on this point.

Doe vs. United States, 253 Fed., 538.
See also Herman vs. United States, 257 Fed. 601.

The question is, could a jury of reasonable men consider the evidence without entertaining a reasonable doubt.

In this case the Court was requested to instruct the jury for a directed verdict (256), and the refusal to do so is assigned as error.

Now the Court in giving its instructions used the following language (286):

> "The law does not forbid differences of opinion or reasonable discussion as to the causes which induced Congress to declare war or as to the results to be attained by war, or at the end of the war, nor the time and conditions under which the war should be brought to an end, nor any reasonable and temperate discussions and differences of opinion upon any or all of the

measures or policies adopted in carrying on the war. The law is limited to making it a crime to oppose by word or act the military measures taken by the United States or under lawful authority by the officers of the United States for the purpose of prosecuting that war to a successful end."

The Court also in the same connection gave the following instruction:

> "The defendant is not on trial here for being of German ancestry or in sympathy with the German Government, so far as that is concerned, or the German cause, and out of sympathy with the United States Government. That is not made punishable unless he gives utterance thereto with the wilful intent that I will explain to you hereafter. He is not on trial for having criticized the American Government or the officers of the American Government or the conduct of the war. There is no law in the United States that punishes a man for his fair criticism of the conduct of the war or of the officials of the Government unless it was done with the purpose and intent that I will tell you of hereafter. In other words a man had and now has a right to criticize the Secretary of the Treasury or the Food Administrator, or the Departments of which they are the heads, if he does it with no intent to interfere with the Government in its military measures or activities."

If these instructions are a correct statement of the law then it is obvious that the case should not have been submitted to the jury at all, since the utterances of the defendant under all of the circumstances could not have been given with the intent covered by the statute.

Compare the language used by defendant with that reported in the Frohwerk case, wherein twelve articles published in a German-American newspaper after the United States entered the war were under consideration. There the language covered a wide range and was an attack upon recruiting for the army. Concerning this language the Supreme Court said:

> "It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the country is at war."

The United States Attorney points out that we admit in brief and argument that Mr. Albers used the words attributed to him by the indictment. For the purpose of the appeal it may be assumed that he said those very words, but we have not admitted and do not admit that the words so attributed to him express his mind, or that they are true. On the contrary every circumstance shows that the statements are opposed to his views, and so far as they seem to be statements of fact they are untrue.

Without attempting to review the evidence which, of course, is not our purpose in the present discussion, we cannot refrain from calling attention to the testimony, in passing, of Charles A. Barnard (208) regarding a conversation in which just a few weeks before October 8th, 1918, Albers and he discussed the war and talked of its certain outcome. To contrast the picture so given of Albers when sober with

his utterly different attitude on October 8th, when not sober, is to illustrate in a forcible manner the necessity of applying the test laid down by the Supreme Court and recognized but not applied by these instructions.

The language charged against the defendant criticizes Secretary McAdoo, expresses opinions and uses some denunciation. The few instances of phrases that purport to state any facts are contrary to the record, as "I served twenty-five years under the Kaiser and I would go back to Germany tomorrow," when as a matter of evidence he never served under the Kaiser; "I have helped Germany in this war, and I would give every cent I have to defeat the United States," whereas the record shows he never helped Germany, and all his contributions were for the United States; and "We have won the war," when at the time this was said, on October 8th, 1918, Germany was already asking terms of peace, and in contrast with the fact that the defendant on August 9th, 1918, was expressing to Mr. Barnard exactly the opposite idea (208). As the District Court well said (p. 270) in its instructions:

> "The Statute does not punish or attempt to punish beliefs. It does not punish sympathy. It does not punish opinions merely as such *unless spoken with the purpose of hindering the Government in its war activities.*"

This being the law as recognized by the trial Court itself, our claim is that there was nothing to leave to the jury, and the request for a directed verdict

should have been allowed. For there was no evidence, and no circumstance in the case from which a legitimate inference could be drawn that these words were spoken "with the purpose of hindering the Government in its war activities."

The test as stated in the Schenk case is this:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

The test comports with the general tenor of the District Court's analysis of the statutory crime; but with due respect to that Court, instead of applying the principle, and instead of declaring as a matter of law that there could be no present danger that the words used under the circumstances shown would bring about the evils, and instead of declaring that there was no such proximity, relationship or potentiality in the words as and when spoken as to make such evils probable or even possible,—instead, in other words, of taking the responsibility of telling the jury that the vital element of intent was under the conditions unthinkable, the Court left the jury to infer an intent that did not and could not exist.

> "The jury, however, had no right to find a criminal intent unless such intent was the necessary and legitimate consequence of the words spoken."

Von Bank vs. United States, 253 Fed. 641.

The District Court (p. 291) reiterates that differ-

ences of opinion, reasonable discussion as to the war and the causes of the opposing governments, is not forbidden by the statute. And, although no evidence was given of the nature of the questions, answers, suggestions, expositions of theory or expressions of views of the various persons who participated in the conversation, or even of the remarks of the defendant himself on that occasion save the disjointed, disconnected and fragmentary phrases uttered by him and reduced to writing by the witnesses, nevertheless the Court proceeded to leave to the jury the question whether the defendant wilfully uttered the language imputed to him with the intent and purpose of supporting and favoring the cause of Germany in the war or opposing the cause of the United States therein, as well as the question whether "the natural or reasonable or probable tendency and effect of the words and language so spoken and uttered is to that effect, interpreted by the attending circumstances and demeanor of the defendant."

We respectfully submit that the defendant was entitled to the most favorable interpretation of these several verbal expressions imputed to him, and that without the connecting conversation they are not susceptible of any disloyal import. There was nothing from which an intent to subvert the Government or to aid the cause of her enemies could justly be drawn. At most these are but bar-room mumblings. The undisputed fact, testified to by the Government's own witness (Gaumount, p. 101-2) reveals that before these utterances were given by defendant

and noted down, the man was in such condition that it was suggested that he should be put to bed. He was put to bed, indeed, "body, boots and breeches" but not until after the notes were duly recorded in sundry note books. Not one note was made of the connecting links in the conversation extracting these expressions. The witnesses followed Captain Cuttle's plan, "when found make a note on it." They found what they went after, but were careful to note nothing but what suited their purpose.

This is beyond any reported case, and the Court erred in leaving to the jury a question of evil intent under the circumstances shown by this record. If the principles laid down in the Court's own instructions are applied, the expressions of the defendant are not such as justify a conviction.

2. The other point on which we wish to apply the principles enunciated in the instructions is in relation to the so-called collateral acts. The principles are well established by the recent cases, and yet no decided case so far as we have been able to ascertain has authorized the admission of such statements as offered on this trial, and if the Court had applied its own rule such evidence would never have gone to the jury.

The Court gave the following instruction:

> "To further explain to you the purpose of allowing testimony touching statements made by defendant at other times than the occasions charged in the indictment, I instruct you that

> it was not to prove the utterances of the language set forth in the indictment, and it should not be so considered by you, but to show the bent of defendant's mind and his attitude *as between this country and Germany,* with a view to enabling you to determine the defendant's real intention in saying and doing what the evidence convinces you that he has said and done, as it pertains to the charges made against him."

The words used by the defendant prior to the time our country was involved in the war were at most expressions of opinion, or showed prejudice against England. They did not evince any hostility to the United States, which was not engaged in the war. Most of them indeed are so remote in point of time as to have no possible connection with the war in which our country was afterward involved.

We claim that no case has or could go so far as to say that expressions of hostility to Great Britain or opinions as to the prowess of Germany in the early stages of the Great War would have any bearing upon the question of what was the attitude of mind of the defendant after this country became engaged in the war.

We respectfully point out that a citizen might be loyal to the United States and yet pro-German as between nations at war before our country became involved; and many thousand such citizens, vigorously and effectively supported the United States in our war.

The expressions testified to, for example, by Henry Cerrano (136) employed as a window cleaner for Albers Bros. Co., ought to have been excluded, if the instructions are correct. He says that in October, 1915, while engaged in that occupation he overheard Henry Albers say to a young man who was working at a typewriting machine: "Look at that paper. See what the German army are doing. The German army is doing wonderful, and France and England come very easy," and that when defendant left the room the witness heard him make this statement: "One Kaiser, and one God."

Another illustration is the McKinnon testimony (155-157). This witness under objection related a conversation supposed to have taken place in September, October or November, 1914, in which the defendant used the expression, "We will kill every man, woman and child" in England. A more prejudicial statement cannot be conceived.

Take another illustration, the statement of the witness Cushing (254), who says of the defendant, "He offered to bet witness one thousand dollars to fifty cents, and to loan witness the fifty cents, that the Kaiser could lick the world." He says this conversation occurred shortly after declaration of war between Germany, France and Great Britain.

We respectfully insist that the rule laid down by the decisions used by the Court itself in its instructions is stretched beyond all recognition.

Our purpose in filing this supplemental brief is not to discuss the various points we have made and fully argued in our former brief. Our object here is simply to answer some of the suggestions of the United States Attorney made in his brief and upon the argument, and to explain the application of our oral statement regarding the elaborate instructions given by the Court.

Respectfully submitted,

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